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No. 98-479

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In The

# Supreme Court of the United States

October Term, 1998

KANSAS CITY SOUTHERN RAILWAY COMPANY,

*Petitioner,*

v.

CHARLOTTE McKENNA, *ET AL.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Circuit Court Of Hinds County, Mississippi, First Judicial District**

## RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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## STATEMENT OF THE CASE

On October 23, 1995, a railroad tank car (UTLX 82329) containing liquid dinitrogen tetroxide, more commonly referred to as nitrogen tetroxide, ruptured and exploded on the premises of Gaylord Chemical Corporation in Bogalusa, Louisiana. The tank car was owned by Union Tank Car Company and leased to Gaylord Chemical.

Plaintiffs, constituting specific residents of Louisiana and Mississippi who were exposed to the highly toxic chemicals emanating from the rupture/explosion, filed suit against various defendants in the First Judicial District of Hinds County, Mississippi. With respect to Petitioner, Kansas City Southern Railway Company, Respondents alleged various state-law claims of negligence and strict liability based upon the conduct of the Defendant. More particularly, Respondents allege:

- That UTLX 82329 was transported in interstate commerce from Vicksburg to Jackson, Mississippi, by Petitioner in October, 1995. At all times material, UTLX 82329 weighed in excess of 9,000 pounds above its maximum weight on rail.

- That the transportation by Petitioner of UTLX 82329 violated *Field Manual of Interchange Rules* Nos. 89, 91, 92, and 98 adopted by the Association of American Railroads, since the car was in excess of its maximum weight on rail.

- That the transportation by Petitioner of UTLX 82329 violated various regulations of the Department of Transportation including,

but not limited to, 49 CFR 100, *et seq.*, as well as, 49 CFR Part 215, *et seq.*

- At all times material, Petitioner knew that UTLX 82329 weighed in excess of its maximum weight on rail.
- That Petitioner had the ability at all times material to inspect UTLX 82329. That a competent inspection by Petitioner would have disclosed the defective condition of UTLX 82329.
- That the Federal Regulations identified herein are minimum standards under which Petitioner is expected to operate.
- That the transportation of a hazardous material car, such as UTLX 82329, with a weight in excess of its maximum weight on rail, presents a clear and present danger to the safety and welfare of the public, and constitutes wanton or reckless disregard for public safety.

Pursuant to Mississippi Rules of Civil Procedure, Rule 12(c), Petitioner filed a Motion for Judgment on the Pleadings alleging that Respondents' state-law-based negligence and strict liability claims were expressly preempted by the Federal Railroad Safety Act ("FRSA"), by the Federal Hazardous Materials Transportation Act ("HMTA"), and by regulations issued pursuant to these statutes. The Trial Court correctly denied Petitioner's motion, finding that there was no express preemption and further that the legislation and regulations did not substantially subsume the subject matter. Specifically, the Trial Court was concerned by the fact that discovery was on-going and that all of the myriad of allegations made

by the Plaintiffs were not preempted by federal regulation. The Trial Court also expressed concern that Congress would not have intended to prohibit state law tort claims by individuals for all negligent conduct of railroad companies. The Supreme Court of Mississippi on May 20, 1994 denied Petitioner's Petition for Interlocutory Appeal.

The issue of law being raised by Petitioner is essentially whether the Plaintiffs' claims are preempted by the Federal Railroad Safety Act ("FRSA") and the Hazardous Materials Transportation Act ("HMTA"). The Trial Court correctly determined that neither Act preempts the claims in the current litigation. Thus, the Trial Court's determination is consistent with applicable law and there exists no substantial basis for further consideration of this issue by this Court.

## ARGUMENT

Congress did not expressly preempt state common-law tort claims for injuries that resulted from accidents like those in the instant case. In the absence of such clear and express language, the burden is on Petitioner to show that Congress intended to preclude Respondents from bringing state common-law claims. *Silkwood v. Kerr-McGee Com.*, 464 U.S. 238, 255 (1984). *"Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted." Id.* (emphasis added).

In light of the fact that Congress did not expressly preempt state causes of action such as the one herein, any analysis under the supremacy clause begins with the basic presumption that Congress did not intend to displace state law. *CXS Transp., Inc. v. Easterwood,* 113 S.Ct. 1732, 1737 (1993); *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981). The presumption against preemption is heightened where the federal law would have the effect of barring a state from exercising its traditional police powers. *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 144 (1963). Likewise, the presumption against preemption "is particularly apt" where railroad safety is involved. *Rogers v. Consolidated Rail Corp.,* 948 So.2d 858, 859 (2d Cir. 1991). Where preemption would infringe on a historic police power of the states, courts are advised to *"start with the assumption that the historic police powers of the states were not to be superseded by the federal act unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

Torts, such as those alleged by the Respondents in this case, based upon state common-law principles of nuisance, negligence, trespass, and strict liability, are precisely the sort of legal actions that fall within the scope of Mississippi's historical and prototypical powers. These claims are perhaps the best example of a subject which is "traditionally governed by state law." *In re Miamisburg Train Derailment Litigation,* 626 N.E.2d 85, 90 (1994). Significantly, the presumption against preemption of these causes of action is strengthened where the preemption would leave the Respondents without an adequate remedy for violations of their state created rights. See *Silkwood,* 464 U.S. at 256-57; see also *Cincinnati Metro. Hous.*

*Auth. v. State Employment Relations Bd.*, 560 N.E.2d 179, 53 Ohio St. 3d 221, 224 (Ohio 1990) (stating that *"when the subject matter of state law is within the historical police powers of the state, it is presumed that the state law was not intended to be superseded by federal regulation").* Thus, Petitioner's present application must be evaluated in light of the strong presumption against preemption.

The recent decision of this Court in *Medtronic, Inc. v. Lohr,* 116 S.Ct. 2240 (1996) makes clear that even express preemptive language is narrowly construed. In *Medtronic,* interpreting statutes (the Medical Device Amendments) that expressly preempt state law, the Court found that it "long presumed that Congress does not cavalierly preempt state-law causes of action" and would not find that state law was preempted "unless that was the clear and manifest purpose of Congress." *Medtronic, supra* at 2250.

The key question in preemption analysis is whether Congress intended for state law to be displaced or superseded by federal law. *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2617 (1992). Petitioner cast its arguments that there is preemption in this case on its assertions that the extensive nature of the regulations establishes that Congress impliedly intended to preempt state law tort claims by enacting the FRSA. However, where a statute contains an express preemption clause, an examining court must focus on the plain wording of the preemption clause as the best indicator of the scope of Congressional intent. *Easterwood,* 113 S.Ct. at 1732. A court should resort to principles of implied preemption **only** when Congress has been silent with respect to preemption. *Cipollone,* 112 S.Ct. at 2625 (concurring opinion) (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)); *In re Miamisburg Train*

*Derailment Litig.*, 626 N.E.2d 85, 90 (Ohio Sup.Ct. 1994), *cert. denied sub nom Union Tank Car Co. v. Various Plaintiffs in Class*, 115 S.Ct. 59, 130 L.Ed.2d 17 (1994) (stating that *"[s]ince the FRSA contains an express preemption clause, Section 434, there is no need to look beyond the text of that clause to determine if Congress intended for appellants claims to be preempted"*). If Congress had intended to preempt state law tort claims under the FRSA, it could have simply incorporated such a statement into the relevant statutes or regulations. However, Congress didn't do this.

The express preemption provision of the FRSA states:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force ***a law, regulation, or order related to railroad safety*** until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the *State requirement*. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order –
>
> > (1) is necessary to eliminate or reduce an essentially local safety hazard;
> >
> > (2) is not incompatible with a law, regulation, or order of the United States Government; and
> >
> > (3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106 (emphasis added).

Courts that have examined the legislative intent behind the FRSA have concluded that Congress intended only to preempt the right of a state to *directly* regulate rail

transportation. Petitioner wishes to have this Court find preemption based on the fact that the regulations promulgated under FRSA and the HMTA indicate minimum safety standards in some cases. However, compliance with minimum federal safety standards does not necessarily shield a defendant from liability for its tortious acts. This Court, the same year as *Easterwood*, recognized this principle in *Hatfield v. Burlington Northern R.R. Co.*, 958 F.2d 320 (10th Cir. 1992), *vacated and remanded*, 113 S.Ct. 1940 (1993), wherein it held that state tort law can be compatible with federal regulation and stated that *"the scheme of negligence liability could just as easily complement the regulations."* 113 S.Ct. at 1739. Likewise, as the *Cipollone* plurality stated, "there is not a general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common law damage actions." 505 U.S. at 518. Congress does not always intend, merely by enacting a statutory scheme, to preempt citizens from bringing actions based on common-law tort theories. **In fact, absent express preemption, there is a strong presumption to the contrary.**[1]

Courts that have considered the issue of preemption even at the summary judgment phase of the litigation have found that state law tort claims such as those asserted by Respondents are not preempted by the FRSA.

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[1] In any event, there is no basis for Petitioner to succeed in its interlocutory appeal or on its motion for judgment on the pleadings in the Trial Court absent a factual showing that it did comply with all applicable federal regulations. This is a factual issue that certainly cannot be resolved via a judgment on the pleadings or by this Court on writ practice.

For example, in *In re Miamisburg Train Derailment Litigation*, the Supreme Court of Ohio, using *Easterwood* as a road map, considered preemption claims nearly identical to those in this case. 626 N.E.2d at 85. In *In re Miamisburg*, the plaintiffs brought suit against a railroad, the shipper of hazardous materials and the tank car company (among others) for damages incurred when the rail car containing the hazardous materials ruptured in a derailment (after falling from a bridge) sending up a cloud of dangerous material and causing ***"mass evacuation of the surrounding area due to the potentially toxic effects of . . . cloud."*** *Id.* at 86. The defendants sought summary judgment, claiming that the plaintiffs' *"common-law tort claims were preempted by the federal regulations governing tank car specifications."* *Id.* at 87. The *In re Miamisburg* court found that the FRSA did not preempt all common-law tort claims.

The Ohio Supreme Court also followed the analysis applied in *Easterwood*, seeking to determine whether the regulations applicable to the defendants ***"cove[r] the subject matter of the plaintiffs' tort claims"*** pertaining to tank car specifications. *In re Miamisburg*, at 92-95. *"To prevail on the claim that the regulations have pre-emptive effect, petitioner must establish more than that they 'touch upon' or 'relate to' that subject matter."* *Easterwood*, 113 S.Ct. at 1738. The common-law tort claims will only be preempted if the *"federal regulations* ***substantially subsume*** *the subject matter of the relevant state law."* *Id.* (emphasis added). The *In re Miamisburg* court went on to state that the *"applicable preemption provision must be read narrowly 'in light of the presumption against preemption of state police power regulations.' "* 626 N.E.2d at 92 (quoting *Cipollone*, 112 S.Ct. at 2618).

The Ohio Supreme Court applied the *Easterwood* methodology to the regulations at issue and determined that the regulations did not cover the subject matter that was the substance of the claims and thus, did not pre-empt state tort law. *In re Miamisburg*, 626 N.E.2d at 93. There, the defendants claimed that the regulation at issue which allowed older tank cars to be used without a reinforcement device *"cover[ed] the subject matter"* brought up in the tort claims. *Id.* The court stated:

> The mere general provision of [the regulation] that tanks mounted on or forming part of a tank car "built to specifications predating those in this part may continue in use" is not equivalent to an affirmative specific statement that the owner or operator of a tank car built prior to 1971 is under no duty to retrofit with reinforcing pads; and is also not equivalent to the further specific statement that one who does not retrofit a pre-1971 built tank car with reinforcing pads is shielded from liability under state tort law.

*Id.* Basically, the court found that the lack of specificity in the regulations which the defendants claimed *"covered the subject matter"* of the plaintiffs' claims indicated a lack of intent to preempt common-law claims. *Id.* Thus, the Supreme Court of Ohio found that the state law tort claims were not preempted. This Court should follow that same rationale.

In *In Re: New Orleans Train Car Leakage Fire Litigation*, the Fourth Circuit Court of Appeals of Louisiana, was confronted with facts similar to the facts now before the Court. *In Re: New Orleans Train Car Leakage Fire Litigation*, 671 So.2d 540 (1996). There, Illinois Central Railroad Co. received a fully loaded tank car, and transported the tank

car to Jefferson Parish where it was turned over to New Orleans Terminal Company (NOTC). NOTC delivered the tank car to CSX's interchange track in New Orleans on the morning of September 8, 1987. The tank car exploded the following day. Defendants, Illinois Central Railroad, NOTC, and CSX claimed they had no liability because plaintiffs' state law claims were preempted by the Federal Railroad Safety Act. The court rejected defendants' arguments, holding that *Easterwood* did not bar a suit for breach of state law tort duties.

> FRSA does not preempt the provisions of La. C.C. art. 2315.3 [Louisiana's state law punitive damages statute relating to the transportation or storage of hazardous substances] . . . Like the HMTA, the penalty provisions of the FRSA provide for fines and penalties to be paid to the federal government, not to the individual persons injured as a result of the improper storage, handling, or transportation of hazardous materials . . . the fines and penalties of the two provisions have different purposes.

*In Re: New Orleans Tank Car Leakage*, 671 So.2d at 546. The court found that the statute does not address the regulatory and enforcement authority of the Secretary of Transportation nor does it seek to designate materials as hazardous, it "merely sets forth a cause of action for exemplary damages in favor of an individual person who is injured due to a defendant's wanton or reckless disregard for public safety while engaged in the storage, handling, or transportation of hazardous materials, which are defined by federal law." 654 So.2d at 425. "If Congress had intended to preempt the authority of states to enact laws recognizing a cause of action for the recovery of

additional damages to persons injured by persons, who with wanton or reckless disregard for the safety of others, handle hazardous materials, Congress could easily have done so by including language to that effect . . . Congress did not . . . " *Id.*

*In Southern Pacific Transportation Co. v. United States,* 462 F.Supp. 1193 (E.D.Cal. 1978), the United States District Court for the Eastern District of California extensively analyzed the legislative intent behind the FRSA and the HMTA. In *Southern Pacific,* a railroad sought to recover damages when a government boxcar exploded. *Id.* at 1195. The government sought to dismiss the suit by claiming that its compliance with federal regulations preempted the right of the rail carrier to obtain compensation pursuant to the Federal Tort Claims Act. *Id.* at 1196. The government further argued that the comprehensive nature of the regulations and statutes governing railroad transportation clearly established Congress' intent to preempt the entire field of rail transportation. *Id.*

The *Southern Pacific* court extensively reviewed all relevant railroad statutes and regulations. During its examination, that court analyzed the legislative history behind the HMTA and the FRSA, holding that Congress **did not** intend the statute to block tort actions. The court specifically concluded that the HMTA permitted private citizens to obtain compensation despite the fact that a tortfeasor may have complied with federal standards. *Id.* at 1227. The court stated that:

> The Act explicitly expresses a Congressional intent not to pre-empt state laws unless those laws are contrary to the scheme of federal regulation. **Finally, the Act is wholly silent as to the**

> **remedies available to private persons injured by a violation of the Act or regulations.** Similar silence in the context of the Safety Appliance Acts has long been interpreted to leave the question of remedies to state law, and no basis for a different conclusion under this Act is apparent. The same result is appropriate as to the federal regulation of hazardous materials, which predated the Roseville explosions under the Explosives Transportation Act, 18 U.S.C. §§ 831-35. The Act authorized the promulgation of regulations for the safe transportation of explosives and other dangerous articles and provided criminal penalties for violations. **As with the Hazardous Materials Transportation Act, the Explosives Transportation Act evidences no intent to affect state re-evaluation of tort liability.** *Id.* at 1224 (emphasis added), *see also* n.11; H.R.Rep. No. 1975, re-printed in 1960 U.S. Code, Cong. 2 Admin. News 1960, pp. 3351, 3355 (*"The Committee feels that there is nothing in the Bill to preempt the field to the exclusion of the states"*).

The *Southern Pacific* court also held that the FRSA does not prohibit citizens from bringing tort claims for injuries.

> Although the Federal Railroad Safety Act of 1970 and the cases construing it reflect the Congressional intent to preempt the regulation of railroad safety and to achieve national uniformity, **no indication is given in the Act or its legislative history that Congress intended to pre-empt state tort liability doctrine affecting the remedies either for violation of the federal regulations in particular or for railroad related accidents in general.** In the absence of such indication of Congressional intent, this court

> concludes that Congress intended no alteration in their prevailing scheme of federal law as it interrelates with state law . . . Congress acts within the framework of existing law, both state and federal statutory and decisional. **That framework clearly left the incidence of an action for recovery of damages to state law when Congress deliberated and enacted the 1970 Act; Congressional silence should be deemed in this instance to leave the existing framework unaltered.**

*Southern Pacific*, 462 F.Supp. at 1226 (emphasis added).

Although the judicial precedent interpreting the legislative history is clear that Congress did not intend the HMTA and the FRSA to preempt state tort actions, Petitioner mistakenly asserts that the scope of federal regulations is so broad as to form the basis of preemption. Merely because extensive regulations exist does not mean Congress intended to preempt state law tort claims. In *Hillsborough County, Fla. v. Automated Medical Lab., Inc.*, 471 U.S. 707 (1985), the United States Supreme Court held that:

> We are even more reluctant to infer preemption from the comprehensiveness of **regulations** than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. **To infer pr -emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field its regulations will be exclusive.** Such a rule, of course, would be inconsistent

> with the federal-state bounds embodied by our supremacy clause jurisprudence.

*Id.* at 717 (emphasis added); *MacGillivray v. Lederle Lab., Inc.*, 667 F.Supp. 743, 745 (D.N.M. 1987).

Under the analysis that Petitioner wishes this Court to adopt, and which was properly rejected by the Trial Court, all state law tort claims would be preempted merely because the Secretary has enacted multiple rules regarding the packaging, labeling, loading and handling of shipments of hazardous materials. In this case, as in *Easterwood* and *In re Miamisburg*, the issue is not whether Petitioner could be held to a more stringent standard than stated by the federal regulations, but whether there is a federal regulation that substantially subsumes the subject matter of the plaintiffs' tort claims. 626 N.E.2d at 92 (*citing Easterwood*, 113 S.Ct. at 1378). As *Easterwood* and *In re Miamisburg* make clear, the specific regulations must be compared to the tort claims brought by the plaintiffs. *In re Miamisburg*, 626 N.E.2d at 92-93 (applying *Easterwood* methodology). However, Petitioner **improperly** asserts that because the Secretary has issued several regulations touching upon areas related to the Respondents' claims, Congress intended to preempt all tort claims. This argument is plainly in conflict with *Easterwood* and must be rejected. Congress, frankly, has not promulgated laws governing the Respondents' state law tort claims. In essence, the 10th Amendment is yet to have been repealed.

While negligence claims in areas substantially subsumed by federal regulations may in certain instances be

preempted, negligence claims **not** based on acts or procedures covered by the regulations **cannot** be preempted. For example, as mentioned in *Easterwood*, if the Respondents claimed that the train should have been traveling below the maximum speed approved by the Secretary, such claims would, under most circumstances, be preempted. 113 S.Ct. at 1743. However, if the railroad exceeded the maximum speed limit (or otherwise violated regulations) imposed by the Secretary, a negligence claim clearly would **not** be subsumed by the regulations.

Congress, merely by enacting regulations such as the FRSA and the HMTA, did not intend to relieve Petitioner of its duty to act reasonably under the circumstances. *"[A] negligence action based on a duty to slow or stop a train to avoid a specific, individual hazard is not pre-empted." Earwood v. Norfolk Southern Ry. Co.*, 845 F.Supp. 880, 885 (N.D. Ga. 1993) (citing *Easterwood*, 113 S.Ct. at 1742 and n. 15). In other words, e.g., despite the fact that a train may be operating below the maximum speed set by the Secretary, the railroad has a duty to slow down on a certain section of track if it knows, that due to track conditions, there is a strong likelihood that the train may derail and cause serious injury to a substantial number of people. *See Easterwood*, 113 S.Ct. at 1743 and n. 15; *In re Miamisburg*, 626 N.E. 2d at 94, n. 6.

This same logic applies to this case where Petitioner was well aware of the dangers and problems associated with the tank car, and, though it was in a position to do so, did nothing. As the *Easterwood* court suggested, claims by the Respondents are not preempted to the extent that they are based on the defendants' duty of due care to

avoid a **known** danger. Thus, Respondents' common-law claims against Petitioner are not preempted.

## CONCLUSION

Nowhere does the FRSA state that there is no private right of action for tortious conduct by a railroad company. This simply is not the law. Because the law permits private state-law-based causes of action for tortious conduct, Petitioner's argument must fail. The fact that certain federal regulations may deal with or touch upon the areas of railroad safety to which Mississippi tort law also is sought to be applied in this case, clearly is not sufficient for preemption under the FRSA, as interpreted by *Easterwood*.

For the foregoing reasons, Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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